

No. 19-15716

IN THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

INNOVATION LAW LAB, *et al.*,

Plaintiffs-Appellees,

v.

KIRSTJEN NIELSEN, Secretary of Homeland Security, *et al.*

Defendants-Appellants.

*On Appeal from the United States District Court
for the Northern District of California
No. 3:19-cv-00807-RS*

**APPELLEES' OPPOSITION TO APPELLANTS' REQUEST FOR
ADMINISTRATIVE STAY PENDING RESOLUTION OF
APPELLANTS' MOTION FOR A STAY PENDING APPEAL;
REQUEST FOR BRIEFING SCHEDULE ON MOTION FOR A STAY
PENDING APPEAL**

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CORPORATE DISCLOSURE STATEMENT

Appellees are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in Appellees.

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The government's emergency request for an administrative stay pending resolution of its motion for a stay pending appeal should be denied. Plaintiff-Appellees are six non-profit immigrant legal services organizations, together with eleven individual asylum seekers who have been returned to Mexico, where they have already suffered physical and verbal assaults and are at grave risk of further violence. The district court issued a preliminary injunction on April 8 after concluding that the government's new policy of forcing asylum seekers to wait in Mexico pending their removal proceedings in the United States was likely unlawful in multiple respects and resulted in irreparable harm to the Plaintiffs. Plaintiffs respectfully request that the Court deny the request for an administrative stay and set a briefing schedule on the government's motion for a stay pending appeal that would permit Plaintiffs until 9 a.m. Pacific Time on Tuesday, April 16, 2019, to submit their opposition, unless the Court concludes that the government's motion can be denied without further briefing.

Although the government has styled its motion as a request for an "emergency" stay, Plaintiffs do not believe there is sufficient urgency either to warrant an administrative stay or to require a response from Plaintiffs before April 16. Indeed, in issuing its preliminary injunction on April 8, 2019, the district court stayed the injunction's effective date until Friday, April 12, 2019, at 5 pm Pacific Time, in order to give the government ample time in which to seek a stay from this

Court. Yet the government waited until late last night, more than three days after the district court issued its decision and less than 20 hours prior to the effective date set by the district court, to file its stay motion, thereby ensuring that the motion could not be fully briefed prior to the time the injunction is scheduled to go into effect. The government should not be allowed to manufacture the need for an emergency administrative stay by failing to timely file a stay request.

Moreover, the government's claims of irreparable harm and the need for an administrative stay are seriously undermined by the fact that it has reportedly already voluntarily stopped returning migrants to Mexico since the issuance of the district court's decision on Monday, April 8, 2019. *See, e.g.*, Robert Moore, "DHS lawyers signal agency will not send migrants back to Mexico, abiding by court ruling," Washington Post, April 10, 2019 (citing statement by assistant chief counsel for DHS that asylum seeker would not be returned to Mexico earlier this week, as result of court order).¹ If compliance with the injunction were going to be so disastrous for the government that it needs an emergency administrative stay, it does not make sense that the government would voluntarily put the policy on hold before being compelled to do so.

¹ Available at https://www.washingtonpost.com/immigration/dhs-lawyers-signal-agency-will-not-send-migrants-back-to-mexico-abiding-by-court-ruling/2019/04/10/9643b220-5bd5-11e9-a00e-050dc7b82693_story.html?utm_term=.b599f6d0536a.

These two aspects of the government’s conduct – its delay in submitting its stay motion and its decision to voluntarily stop returns to Mexico even prior to the injunction taking effect – strongly undermine any claim that an emergency stay is necessary to prevent the government from suffering irreparable injury.

Furthermore, the case for a stay is especially weak in light of the “unprecedented” nature of the new policy that is being enjoined, *see* Stay Mot. Ex. B. at 14, as well as the fact that the enjoined policy has been in place less than three months – only since January 28, 2019, and only in limited locations. Stay Mot. Ex. A at 4-5. Thus, as in *East Bay Sanctuary*, the district court’s temporary freeze of the challenged policy “restore[s] the law to what it had been for many years prior.” *Id.* at 25 (citing *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018)).

As the district court held, Plaintiffs have demonstrated a likelihood of success on their claim that the new forced return policy is illegal “because the statute DHS contends the [policy] is designed to enforce does not apply to these circumstances, and even if it did, further procedural protections would be required to conform to the government’s acknowledged obligation to ensure aliens are not returned to unduly dangerous circumstances.” *Id.* at 2. Accordingly, for the reasons set forth above, and because “there is no real question that [Plaintiffs face] the possibility of irreparable injury,” *id.* at 24, this Court should deny the request

for an immediate administrative stay. Should the Court conclude that a response is needed, Plaintiffs respectfully request that they be permitted to file an opposition to the motion to stay by 9 a.m. on April 16, 2019.

CONCLUSION

The motion should be denied.

Dated: April 12, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2019, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Judy Rabinovitz

Judy Rabinovitz

Dated: April 12, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 773 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Judy Rabinovitz

Judy Rabinovitz

Dated: April 12, 2019